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BAKTI DINAMIK SDN BHD v. BAUER (MALAYSIA) SDN BHD (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
MOHD NAZLAN GHAZALI JC
[ORIGINATING SUMMONS NO: 24NCC-345-09-2015]
B 7 SEPTEMBER 2016

CIVIL PROCEDURE: *Injunction – Fortuna injunction – Injunction to restrain winding up petition – Presentation of winding up petition by third party arising from payment allegedly due – Whether winding up notice served in good faith –*
C *Whether Fortuna injunction ought to be granted – Companies Act 1965, s. 218*

COMPANIES ACT: *Winding up – Petition – Notice – Presentation of winding up petition arising from payment allegedly due – Whether there was debt due – Whether notice served in good faith – Whether suitable procedure to claim for payment – Companies Act 1965, s. 218*
D

CONTRACT: *Privity – Building contract – Presentation of winding up petition by sub-contractor against employer of main contractor – Petition based on payment due – Whether there was contractual relationship between parties – Whether there was privity of contract between parties – Whether debt could arise independently of contract*
E

The plaintiff, a housing developer, appointed HVC Hundred Vision Construction Sdn Bhd as the main contractor for a housing project. In turn, the main contractor engaged the defendant as a subcontractor. During piling works, carried out by the defendant, one of the buildings adjacent to the
F project site suffered damage and this resulted in an institution of a suit to restrain the construction works and a claim for damages. This delayed the completion of works by the defendant and the architect issued a certificate of non-completion to the main contractor but did not issue the same to the defendant. The defendant issued a winding up notice to the plaintiff pursuant
G to s. 218 of the Companies Act 1965 ('the s. 218 notice'), claiming for payment due under the interim certificates. The plaintiff argued that the s. 218 notice was issued in bad faith and that there was no debt due from the plaintiff to the defendant. In these proceedings ('encl. 1'), the plaintiff sought (i) a declaration that the s. 218 notice issued by the defendant was an abuse of the process of court; and (ii) a *Fortuna* injunction to restrain the defendant
H from presenting the s. 218 notice until the full resolution of the dispute between the parties. In support of the filing of encl. 1, the plaintiff submitted that there was no privity of contract between the plaintiff and the defendant to justify the latter issuing the s. 218 notice. The issues that arose for the court's determination were (i) whether there was a contractual relationship
I between the plaintiff and the defendant; and (ii) whether a debt could arise independently of a contract.

Held (allowing encl. 1):

(1) The doctrine of privity of contract must be upheld. The plaintiff was not privy to the contract between the defendant and the main contractor. Whilst the defendant's claim as the subcontractor in respect of work done was premised on the interim certificates; these were issued by the architect to the main contractor in respect of the contract between the plaintiff and the main contractor. The contract did not, in any event, give the defendant the contractual right against the plaintiff. The defendant could not premise the s. 218 notice on a debt which was not due from the plaintiff. Even if a debt was established, given non-payment of the said interim certificates, it would be for the main contractor, the party which was seized of the contractual nexus with the defendant, that must answer the claim. (paras 23 & 28)

(2) The defendant's argument that a debt may come into existence independently of or in the absence of a contractual basis was an unwarranted attempt to create an exception to the doctrine of privity of contract. Given the clear absence of any debt owing by the plaintiff under the main contract to the defendant, the s. 218 notice issued by the defendant was not sustainable under the law. A petition, if presented on the s. 218 notice in the instant case, would be bound to fail. (paras 30 & 35)

(3) The plaintiff had successfully established its case for the grant of a *Fortuna* injunction to restrain the presentation of the s. 218 notice by the defendant. If permitted to subsist, the s. 218 notice would constitute an abuse of court process. Therefore, it must be held to be void. Considering the nature and context of the claims between the parties, there was nothing preventing the defendant from pursuing an adjudication claim pursuant to the Construction Industry Payment and Adjudication Act 2012. This would be the more suitable alternative procedure for the defendant to assert its claim instead of inflicting upon the plaintiff undue pressure *via* a winding up notice through the medium of the winding up court that could occasion irreparable damage to an otherwise commercially solvent company and when there was no judgment debt. (paras 56 & 62)

Case(s) referred to:

Bakti Dinamik Sdn Bhd v. Bauer (Malaysia) Sdn Bhd [2016] 1 LNS 645 HC ***(refd)***

Dataran Rentas Sdn Bhd v. BMC Construction Sdn Bhd [2007] 6 CLJ 613 CA ***(refd)***

Dawnays Ltd v. FG Minter Ltd and Another [1971] 2 All ER 1390 ***(refd)***

Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1942] 2 All ER 122 ***(refd)***

Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation of the Commonwealth of Australia [1978] VR 83 ***(refd)***

Hasjuara (M) Sdn Bhd v. Bio Science Capital Sdn Bhd [2009] 1 LNS 1430 HC ***(refd)***

Josu Engineering Construction Sdn Bhd v. TSR Bina Sdn Bhd [2013] 9 CLJ 650 HC ***(refd)***

Kepong Prospecting Ltd & Ors v. Schmidt [1967] 1 LNS 67 PC ***(refd)***
Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd [2007] 3 CLJ 295 CA ***(refd)***
Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy [2011] 1 CLJ 947 CA ***(refd)***
Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd [1995] 2 CLJ 345 SC ***(refd)***
Rush & Tompkins Ltd v. Greater London Council [1989] AC 1280 ***(refd)***
Tweddle v. Atkinson [1861] 1 B & S 393 ***(refd)***
Watta Battery Industries Sdn Bhd v. Uni-Batt Manufacturing Sdn Bhd And Chow Siew Hon & Ors (Interveners) [1993] 1 CLJ 555 HC ***(refd)***
Westform Far East Sdn Bhd v. Connaught Heights Sdn Bhd [2010] 2 CLJ 541 CA ***(refd)***
Zalam Corporation Sdn Bhd v. Dolomite Readymixed Concrete Sdn Bhd [2011] 9 CLJ 705 CA ***(refd)***

Legislation referred to:
Companies Act 1965, s. 218

For the plaintiff - Chetan Jethwani; M/s Kumar Partnership
For the defendant - Wong Li Wei; M/s Mohanadass Partnership

Reported by Najib Tamby

JUDGMENT

Mohd Nazlan Ghazali JC:

Introduction

[1] This is an application documented in encl. 1, arising from an originating summons firstly, for a declaration that a winding up notice issued by the defendant to the plaintiff and any intended petition thereafter constitute an abuse of the process of the court; and secondly, an injunction to restrain the defendant from presenting the winding up petition against the plaintiff until the full resolution of the dispute between the parties.

Context

[2] Pending the hearing of encl. 1, the plaintiff had also filed an application in encl. 7 for an interlocutory *Fortuna* injunction for the same purpose of preventing the defendant from presenting a petition following the issuance of a winding up notice under s. 218 of the Companies Act 1965 by the defendant against the plaintiff. Following the *inter parte* hearing of the application, I allowed the same. Parties have since been furnished with the judgment containing the full reasons for my decision. This can also be found in *Bakti Dinamik Sdn Bhd v. Bauer (Malaysia) Sdn Bhd* [2016] 1 LNS 645.

[3] It is not in dispute that the true essence and substance of encl. 1 is an application for a *Fortuna* injunction to restrain the defendant from presenting a petition for the winding up of the plaintiff. There are in fact no new issues of substance introduced by the parties in the hearing for encl. 1 that have not already been raised in the proceeding for encl. 7. The arguments contained in the written submissions of the parties for encl. 1 are identical to the ones previously highlighted in the parties' respective written submissions for

encl. 7. The only one new issue concerns a new development that did not truly concern the merits of the application. I will deal with this towards the end of this judgment.

[4] Having evaluated the affidavits and the written submissions, I arrived at the decision to allow the application in encl. 1 for a declaration that the winding up notice is an abuse of process and a *Fortuna* injunction be granted to restrain the filing of a winding up petition. The reasons for the decision are very substantially similar to the grounds for my earlier ruling which had allowed encl. 7. As such, for the record and sake of completeness, I shall set out my grounds for the same hereunder, *albeit* in summary fashion.

Key Background Facts

[5] The plaintiff is the employer, owner and developer of a project known as the Residensi Tribeca which consists of a 37 storey block of service apartments at Jalan Imbi in Kuala Lumpur ("the project").

[6] The plaintiff appointed HVC Hundred Vision Construction Sdn Bhd ("HVC") as the main contractor for the project. The main contractor was a turnkey contractor for the entire project covering all the construction works. HVC in turn engaged the defendant as a subcontractor for earthworks, which included reinforced concrete drain diversions, piling and basement substructure works.

[7] The project is being administered by Veritas Architects Sdn Bhd ("the architect") and Dr. C C Wong Jurutera Perunding as the consultant engineer. The valuation of works on the site is carried out by Perunding Kos T&K Sdn Bhd ("the quantity surveyor").

[8] During the course of the construction works, specifically the piling activities carried out by the defendant, one of the buildings adjacent to the project site, owned by Wagner Piano Sdn Bhd ("Wagner Piano") was claimed to have suffered damage, resulting in the latter instituting a suit to restrain the construction works and claim damages.

[9] There was a delay to the completion of the works by the defendant with the architect issuing a certificate of non-completion to the main contractor to certify the delay and the imposition of Liquidated Ascertained Damages (LAD). No certificate of non-completion was issued to the defendant. In fact, a certificate of practical completion was issued on 13 March 2015 by the architect to HVC in relation to the scope of work of the defendant.

[10] The defendant, however, on 29 June 2015 issued a notice pursuant to s. 218 of the Companies Act 1965 ("the s. 218 notice") claiming payment of the sum of RM3,976,313.38 from the plaintiff said to be due under Interim Certificates No. 15, 16 and 17.

[11] The plaintiff then issued a response on 16 July 2015 stating that the s. 218 notice was issued in bad faith and that there was no debt due from the plaintiff to the defendant under the interim certificates, highlighting in particular that:

(i) The interim certificates on which the s. 218 notice was based were qualified and subject to deductions for LAD in the amount of RM1,230,000;

(ii) There were damages for defective works in the amount of RM100,000;

(iii) The sum was subject to deductions resulting in damage to neighbouring properties as result of poor workmanship including the damage to Wagner Piano where a liability of RM3,825,224.40 has arisen;

(iv) The plaintiff was entitled to set off a sum of RM1,558,961.12 with respect to the works done by the defendant.

[12] The plaintiff then filed these proceedings in encl. 1 for a declaration that the s. 218 notice was void and of no effect and for a *Fortuna* injunction to restrain the defendant from presenting any winding up petition.

Summary Of Contentions By Parties

[13] The thrust of the arguments advanced by the plaintiff to support its application for a *Fortuna* injunction are twofold. The first is that there is no privity of contract between the plaintiff and the defendant to justify the latter issuing a notice of winding up under s. 218 of the Companies Act 1965 ('the CA") dated 29 June 2015 ("the s. 218 notice") in the first place. Secondly, the plaintiff has a cross-claim against the defendant in that the amount being claimed in the s. 218 notice is premised on the non-payment of the interim certificates number 15, 16 and 17 directed against HVC, being the main contractor for the project, not the plaintiff, and which is subject to deductions in favour of the plaintiff for LAD imposed by the architect and other defective works carried out by the defendant.

[14] The defendant, on the other hand, resisted the application and contended that its claim for RM3,976,313.38 was valid for it was the total certified sums which are still outstanding for work done by the defendant. The certificate of practical completion had been issued by the architect to HVC, the main contractor in respect of the subcontract works of the defendant, pursuant to which the works under the responsibility of the defendant were practically completed on 28 February 2015. HVC did not at any time issue any certificate of non-completion ("CNC") against the defendant.

[15] Instead, the architect issued four CNCs against HVC on 19 November 2014, 6 February 2015, 4 March 2015 and 20 April 2015. The defendant thus contended that not having been issued with any CNC, no liquidated damages could be imposed on the defendant, relying also on cls. 16.1 and

26.13 of the sub-contract. It is thus entitled to the payment of RM3,976,313.38 as set out in the s. 218 notice for neither the plaintiff, whom the defendant asserted had the obligation to make direct payment to the defendant under the terms of the letter of award, nor HVC had paid the defendant for work done prior to the issuance of the CPC.

[16] The defendant further argued that the plaintiff's claims in respect of firstly, the LAD for RM1,230,000 and secondly the damage to the property of Wagner Piano are of no relevance to the defendant for these are matters to be resolved between the plaintiff and HVC as the main contractor, since the CNCs were all issued against HVC and not the defendant. There is additionally no right of set-off against the sums certified in the interim certificates for the same reason that there was not a single CNC issued against the defendant. The defendant relies on the Court of Appeal decision in *Dataran Rentas Sdn Bhd v. BMC Constructions Sdn Bhd* [2007] 6 CLJ 613; [2008] 2 MLJ 856 which held that the question whether a building contract admits of a right of set-off is one that turns upon the true construction of the contract which may have the effect of modifying the common law and equitable rights of set-off of the contracting parties. The defendant again referred to cls. 16.1 and 26.13 of the sub-contract to the effect that in the instant case, there is no right of set-off that can be exercised by the plaintiff.

[17] It is also the submission of the defendant that the plaintiff now blaming the defendant to be responsible for the damage to the property of Wagner Piano when the former did not during the material period prior to the issuance of the s. 218 notice allege to the same effect is thus clearly an afterthought. It was not raised in the defence of the plaintiff in the earlier suit instituted by Wagner Piano, nor throughout the course of the subcontract works right through the issuance of the CPC.

[18] The defendant further asserted that the obligation on the part of the plaintiff to pay the defendant is not based on the existence of a contractual relationship but instead on the premise that there is indebtedness owing by the plaintiff to the defendant. Thus the defendant submitted that a debt may arise not only by agreement and in the instant case the claim is based on the interim certificates which, by their nature, constitute a debt due by the plaintiff to the defendant.

[19] In essence, the defendant therefore argued that there is no *bona fide* disputed debt on substantial grounds nor any basis to allege an abuse of process on the part of the defendant who is merely exercising its statutory right to pursue a winding up process under the CA.

Evaluation And Findings By This Court

The Law

[20] The jurisprudential basis of the applicability of *Fortuna* injunctions in this country in part may be traced to the eponymous Australian case of *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation of the*

Commonwealth of Australia [1978] VR 83, a decision of the Supreme Court of Victoria. It established that an injunction would only be granted in circumstances where to allow the petition would be an abuse of process as the petition has no chance of success. And that the plaintiff would have to show that the petition, if presented, would likely be dismissed. To do this, the court would have to consider whether there is a *bona fide* dispute of debt based on substantial grounds. The same principles were adopted and applied by our Court of Appeal, such as in *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295; [2007] 3 MLJ 316.

[21] In another decision of the Court of Appeal, in the case of *Pacific & Orient Insurance Co Bhd v. Muniammah Muniandy* [2011] 1 CLJ 947, Ramly Ali JCA (as he then was) provided most instructively the following explanation:

> [25] An application for an injunction to restrain an intended winding-up petition against a company is known as a "*Fortuna* Injunction", taking its name from the case of *Fortuna Holdings Pty Ltd v. The Deputy Commissioner of Taxation* [1978] VR 83. In that case the court laid down the basis on which a court acts to restrain the presentation of a winding-up petition and the two principles that guide courts in the grant of an injunction to that effect. (see also: *Mobikom Sdn Bhd v. Inmiss Communications Sdn Bhd* [2007] 3 CLJ 295 (Court of Appeal).
>
> [26] The first principle laid down in that case is that an injunction of that nature may be granted by court where the presentation of the petition might produce irreparable damage to the company and where the proposed petition has no chance of success. In order to succeed in getting injunction under this principle, the applicant must satisfy both limbs of the principle ie:
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> (i) the intended petition has no chance of success, as a matter of law as well as a matter of fact; and
>
> (ii) the presentation of such petition (which has no chance of success) might produce irreparable damage to the company.
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> (see: *Re A Company* [1894] 1 Ch 349; *Charles Forte Investment Ltd v. Amanda* [1964] 1 Ch 240, [1963] 2 All ER 940; and *Bryanston Finance Ltd v. De Vries (No 2)* [1976] 2 WLR 41, [1976] 1 All ER 25).
>
> [27] This principle is not applicable to the present case. The respondent herein had obtained a valid and enforceable judgment against the insured as well as the insurer (appellant). The intended petition if filed is not bound to fail. He has a good chance to succeed. Therefore whether or not it causes irreparable damage is of no consequence. Thus the injunction applied for by the appellant in the present case, cannot be granted by court under this principle.
>
> [28] The second principle established in the *Fortuna* case is that an injunction of that nature may be granted in cases where a petitioner proposing to present a petition has chosen to assert a disputed claim, by a procedure which might produce irreparable damage to the company, rather than by a suitable alternative procedure.

> [29] This principle applies only to disputed debt. It does not apply to cases where the debt in question is undisputed. As long as the debt cannot be disputed, it is not consequence whether or not it will cause irreparable damage to the company, if presented. A valid and enforceable judgment of court as in the present case, (unless set aside or stayed) cannot be considered a disputed debt. The law is settled on this point. Therefore, an order for injunction as prayed for by the appellant in the present case, also cannot be granted under this principle.

[22] The courts may thus grant a *Fortuna* injunction to prevent the presentation of a winding up petition on the basis of either the petition has no chance of success and might produce irreparable damage to the company, or that an assertion of a disputed claim is made in the petition by way of a procedure that might produce irreparable damage. The courts must be satisfied that the plaintiff has established a *prima facie* case of an abuse of process by the presentation of a petition particularly on the basis of a disputed debt.

There Is No Debt From The Plaintiff As There Is No Contractual Relationship Between The Plaintiff And The Defendant

[23] On the evidence before me in this application, whilst the defendant's claim as the sub-contractor in respect of work done is premised on the interim certificates no. 15, 16 and 17 and the certificate of practical completion, these were issued by the architect to the main contractor (HVC) in respect of the contract between the plaintiff and the main contractor (the main contract). Although the contract between the defendant and HVC, being the letter of award from the latter to the former dated 26 August 2013 ("the letter of award") in cl. 7.5 expressly provides for the payment by the main contractor to the subcontractor to be made by the plaintiff on behalf of the main contractor, in my view it is fundamental that the doctrine of privity of contract must be firmly upheld. Here, the plaintiff is not privy to the letter of award contract between the defendant and the main contractor, and even that cl. 7.5 states to the effect that it does not in any event give the defendant the contractual right against the plaintiff.

[24] Given its importance in this application, I reproduce cl. 7.5 of the letter of award hereunder:

> Notwithstanding the conditions of the Sub-Contract, Bakti Dinamik Sdn Bhd (hereinafter referred to as the "Employer"), Hundred Vision Sdn Bhd (hereinafter referred to as the "Contractor") and Bauer Sdn Bhd (hereinafter referred to as the "Sub-Contractor") agree that all payments to be made by the Contractor to the Sub-Contractor in accordance with the Sub-Contract *shall instead be made directly by the Employer to the Sub-Contractor for and on behalf of the Contractor within the Period of Honouring of Certificate of Payment. All direct payments made under this provision shall not create a privity of contract between the Employer and the Sub-Contractor*. (emphasis added)

[25] It is thus clear that the plaintiff, as the employer, in making payment pursuant to the letter of award on any interim certificates to the sub-contractor, being the defendant, is purely performing an act on behalf of the main contractor, HVC. In the first place, surely it can only arise if there is an obligation on the part of HVC to make payment to the defendant. But this is patently only secondary to the more pertinent and applicable point that even if HVC were contractually bound to effect such payments, the plaintiff's alleged failure to do so on behalf of HVC is of no legal or contractual consequence *vis-à-vis* the rights of the defendant. It is so trite that this must be the case in the absence of a contractual relationship between the plaintiff and the defendant. And nothing could be more crystal clearly worded than the aforesaid last sentence of cl. 7.5 which unmistakably states to such exact effect.

[26] The plaintiff's position on this point is further fortified by the fact that the very interim certificates the defendant relies on each contains the statement that the amount due in the respective certificates is owing from the plaintiff as the employer to HVC, the main contractor ("is now due to the contractor by the employer"). The defendant is thus a third party to these interim certificates too. Additionally, the letters accompanying each of the certificates from the architect are clearly addressed and directed to HVC, *albeit* these letters seek to instruct HVC on what sums are due to be released to the defendant in respect of the sub-contracted works. But the defendant is not a party to the interim certificates or the letters accompanying them in as much as the plaintiff is not privy to the letter of award.

[27] Further, cl. 24.1(c) of the Agreement and Conditions of PAM Sub-Contract 2006 (For Use Where the Sub-Contractor is Nominated Under The PAM Contract 2006) which expressly permits the defendant to end his appointment in the event of non-payment by the main contractor clearly supports what is already plain and obvious that the defendant's recourse is only against the main contractor, not the plaintiff. Additionally, this cl. 24.1(c) specifically provides that such payment obligation by the main contractor in respect of any certificate is however subject to any set-off the main contractor could be entitled to under the same contract with the defendant.

[28] In my judgment, accordingly, in the absence of a contractual relationship between the plaintiff and the defendant, the claim of unpaid debt made by the latter is thus unsustainable. The defendant cannot premise its s. 218 notice on a debt which is not due from the plaintiff. Even if a debt is established given non-payment of the said interim certificates, it would be for HVC, the party which is seized of the contractual nexus with the defendant that must answer the claim. In order to vindicate its right for payment under the letter of award, the defendant's avenue is to first make a claim against HVC. Even if that is successfully established, still, it is not

for the defendant to enforce the same against the plaintiff directly, for the same overarching reason of the plaintiff not being contractually privy to the relationship between the defendant and HVC.

[29] This court cannot countenance a departure from the well-entrenched rule in the law of contract that a third party can neither benefit nor suffer from a contract executed by other parties. A contract cannot be enforced against or by a third party (see the leading common law authority of *Tweddle v. Atkinson* [1861] 1 B & S 393 and the Privy Council decision in *Kepong Prospecting Ltd & Ors v. Schmidt* [1967] 1 LNS 67; [1968] 1 MLJ 170). The law thus treats the plaintiff as a stranger to the sub-contract, in as much as the defendant a third party to the main contract.

Whether A Debt Arises Independently Of A Contract

[30] The defendant's argument that a debt may come into existence independently of or in the absence of a contractual basis by relying on the House of Lords authority in the case of *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1942] 2 All ER 122 is in my view, an unwarranted attempt to create an exception to the doctrine of privity of contract. The fundamental point decided by the House of Lords was the right to repayment of money prepaid under a contract which was discharged by impossibility of performance or frustration.

[31] In essence, the defendant is trying to make the argument that firstly, the right for payment in its favour arose from a "debt" owed by the plaintiff, which term was referred to by the case of *Watta Battery Industries Sdn Bhd v. Uni-Batt Manufacturing Sdn Bhd And Chow Siew Hon & Ors (Interveners)* [1993] 1 CLJ 555; [1993] 1 MLJ 149 as denoting not only the obligation of the debtor to pay, but also the right of the creditor to receive and enforce payment. Secondly, more significantly this alleged obligation on the part of the plaintiff to pay the debt is not founded on a contract, but created by law in the form of a *quasi*-contract. The defendant did not fully develop its argument on this point, but this appears to be the contention of the defendant.

[32] Such assertions by the defendant are untenable and without merit, as is its reliance on *Fibrosa Spolka* wholly misconceived and unjustified. That case is a leading authority on the subject of frustration of contract. The House of Lords decided that where a party receives no benefit from a contract, but has paid part of the consideration prior to frustration, then that party can recover the advance payment since there has been a total failure of consideration. It has little resemblance to the facts, nor relevance to the real and substantive issues before the court in the instant case. Frustration of contracts by definition involves the pre-existence of a contract which performance is subsequently frustrated. In the instant case, it is incontrovertible that there is no contract between the plaintiff and the defendant to start with. Neither is frustration of any relevance to the instant case.

[33] Moreover, *Fibrosa Spolka* held that whilst recovery is based on a *quasi*-contractual right, this right is not premised on any implied promise to repay but instead on an obligation imposed by law with the overriding objective of preventing unjust enrichment. Thus in the process, the whole discussion by the House of Lords in that case on money had and received was similarly focused on dissecting circumstances such as payments made in error justifying the law demanding a recipients of money to repay or return the same because it would be simply wrong for the person not to do so.

[34] It cannot therefore by any shred of imagination be argued that there is in this instant case before this court, a *quasi*-contract or that in any event, payment should be made by plaintiff to the defendant in order to prevent any form of an unjust benefit or enrichment to the plaintiff. In my view, it is quite plain that *Fibrosa Spolka* cannot apply to the instant case because the latter does not involve a contract between the parties in dispute in this suit, there is no frustration, and significantly the issue of unjust enrichment does not arise at all.

[35] I am therefore satisfied that on the issue of the absence of a contractual relationship between the plaintiff and the defendant alone, given the clear absence of any debt owing by the plaintiff under the main contract to the defendant, the s. 218 notice issued by the defendant is not sustainable under the law, and thus allowing a winding up petition be presented on its basis would be an abuse of process. A petition, if presented on the s. 218 notice in the instant case would be bound to fail. This therefore, more than justifies the granting of a *Fortuna* injunction to prevent the presentation of a winding up petition by the defendant against the plaintiff in relation to the said s. 218 notice. Thus, it is not strictly necessary to consider the second basis relied on by the plaintiff to support its application for the *Fortuna* injunction. However, for completeness, and should I be adjudged to be wrong on the aforesaid first ground, I shall in any event still analyse the second ground proffered by the plaintiff.

The Plaintiff Has A Valid Cross-Claim

[36] It should be stated that the letter of award, as is standard, expressly provides its terms and those in the Agreement and Conditions of PAM Sub-Contract 2006 (For Use Where the Sub-Contractor is Nominated Under The PAM Contract 2006) ("PAM sub-contract") as forming an integral part of the sub-contract between the parties.

[37] These clauses however do little to advance the case of the defendant, if at all, since they cannot offer an effective riposte to the fundamental issue of the absence of contractual nexus between the plaintiff and the defendant which thus resolves this instant case in favour of the plaintiff.

[38] But these clauses are, in my assessment, relevant when the second basis of contention proffered by the plaintiff to apply for a *Fortuna* injunction is analysed. As stated above, the plaintiff also contends that the debt alleged

by the defendant is subject to cross-claims and cannot be construed as being final. The plaintiff's case, apart from relying on the doctrine of privity of contract argument, is that the sums certified under the interim certificates are expressly stipulated to be subject to any deductions of LAD that may be imposed by the plaintiff. The material words appearing on these certificates are thus:

> Please note that the Employer reserves the right to deduct the total Liquidated Damages amounting to …

[39] The letters from the architect accompanying the certificates as addressed to HVC too clearly provide for the right of the plaintiff to deduct any liquidated damages that may be imposed as a consequence of any delay in the completion of the works.

[40] Whilst the intention is for the plaintiff, as the employer in the construction project, to have the right to make LAD deductions, in as much as for a contractor and a sub-contractor be paid for work completed, the defendant's contention in response is not unattractive for it is rooted in the now familiar basis of the absence of any contractual relationship between the plaintiff and the defendant. The interim certificates, and the letters that accompany each of them concern the relationship between the plaintiff and HVC. Thus the right of the plaintiff to impose LAD is exercisable against HVC, the main contractor, and not against the defendant, the subcontractor. The letter of award granted to the defendant is plainly between the main contractor and the subcontractor. It certainly speaks of the right to impose LAD on the defendant, but that right, under contract law, is exercisable by HVC, not the plaintiff who has no contractual nexus with the defendant.

[41] In this regard, it would not be surprising if the defendant were to charge that the plaintiff's position may be construed as amounting to a contradiction. On the one hand, they argued that the lack of contractual relationship should bar the defendant from presenting a winding up petition. On the other hand, the plaintiff is also at the same time asserting the existence of a cross-claim despite the fact that such claim is to be enforced against HVC, not the defendant who is not contractually privy to any contract with the plaintiff.

[42] Upon deeper evaluation however, I find that the basis of the contention of the plaintiff is not without merit. Whilst both parties attack the case of the other on the same ground of the absence of any contractual relationship between the parties, the position of the defendant is unmistakably flawed in its totality since it is trying to claim a debt from a wrong party. On the other hand, the plaintiff is seeking to prevent the defendant from presenting a winding up petition by asserting the existence of a cross-claim. This cross-claim is however not against the defendant but against HVC. But this without more does not render the plaintiff's argument necessarily faulty.

[43] Whilst any action by the plaintiff against non-completion by the defendant would require the plaintiff to first claim against HVC, a successful claim would likely result in HVC in turn making a demand for payment or LAD deductions against the defendant under the sub-contract. In other words, assuming the claim for the non-completion by the defendant to be valid, the defendant could well suffer LAD deductions should the plaintiff initiate the requisite process against HVC first. The fact that the plaintiff has not yet commenced any such claims does not mean there would not be one in the future.

[44] It is in this sense that the case of the plaintiff on cross-claims is not flawed despite the absence of contractual relationship. In other words, whilst this same ground renders the position of the defendant untenable under the law (for failing the legal prerequisite that there must be a debt owed by the debtor, which in this instant case, is not the correct party), such effect does not to the same extent afflict that of the plaintiff who is attempting to show the existence of a debt which is disputed on substantial grounds. And the question whether there is a valid cross-claim by the plaintiff which could, *albeit* indirectly, be ultimately enforced against the defendant despite the absence of contractual nexus cannot be summarily dismissed as it is an issue that remains to be established by evidence.

[45] The question then is whether the cross-claim by the plaintiff is sufficiently meritorious to render the alleged debt to be *bona fide* disputed on substantial grounds. To start with, I should add that the absence of a contractual nexus is a factor that weighs down the position of the plaintiff not inconsiderably. The defendant referred to the Court of Appeal decision in *Dataran Rentas Sdn Bhd v. BMC Constructions Sdn Bhd* [2007] 6 CLJ 613; [2008] 2 MLJ 856 which in turn cited the Federal Court decision in *Pembenaan Leow Tuck Chui & Sons Sdn Bhd v. Dr Leela's Medical Centre Sdn Bhd* [1995] 2 CLJ 345; [1995] 2 MLJ 57 and argued that these cases established that once interim certificates have been issued, payment must be made, without the setting off of any quantum or monies, or asserting any cross-claims.

[46] It is true that the importance of paying up on duly issued interim certificates to the construction industry cannot be emphasised enough. But in the final analysis what matters is the true construction of the document governing the rights and obligation of the contracting parties in any given project. The defendant in the instant case also cited the English Court of Appeal decision in *Dawnays Ltd v. F G Minter Ltd and Another* [1971] 2 All ER 1390. But payment obligations are not necessarily absolute and automatic, for even in *Dawnays* it is recognised that certain deductions may be permitted. Indeed this right of set-off and cross-claims is also acknowledged in *Dataran Rentas*, where Gopal Sri Ram JCA emphasised that the question whether a building contract admits a right of set off is one that turns upon the true construction of the particular contract.

[47] In *Hasjuara (M) Sdn Bhd v. Bio Science Capital Sdn Bhd* [2009] 1 LNS 1430; [2009] MLJU 1252, the High Court considered *Dataran Rentas* and concluded that in the latter case the common law and equitable rights of set-off had been modified by the terms of the contract whereby the contractual conditions precedent to the exercise of the right to a set-off were clearly absent, such that the appellant could not, on the facts, assert such a right of set-off.

[48] It is observed that in *Hasjuara*, like in the instant case, there is no judgment debt. It cannot therefore, be readily said that there is no disputed debt. Similarly, in both cases, there are clear provisions entitling deductions for LAD given the delay in the completion of the works. In the instant case, the three interim certificates each stated specific amount of LAD entitled to be deducted by the plaintiff. So too there are assertions of cross-claims for defective works which have not been finalised, rendering the amount stated in the s. 218 notice less than certain. Further, it is not critical that the cross-claims must have been litigated, for, as made clear by the High Court in *Josu Engineering Construction Sdn Bhd v. TSR Bina Sdn Bhd* [2013] 9 CLJ 650; [2014] 11 MLJ 916, to evaluate a cross-claim which is genuine and based on substantial grounds at the stage hearing a *Fortuna* injunction application would be to determine the merits of that claim prematurely or to litigate the issue twice.

[49] In the instant case, in my assessment, there is sufficient evidence to support the contention that the plaintiff is reasonably entitled, apart from to the LAD for late completion, to seek recovery from the defendant as its sub-contractor in respect of civil claims arising from the damage by construction works done to the neighbouring properties. For example, in a letter from the architect to HVC dated 10 October 2014 (well before the s. 218 notice of 29 June 2015), the architect updated HVC that the architect, together with the project's civil and structural engineers, had concluded that the piling and basement structure works undertaken by the sub-contractor were responsible for causing cracks to the shop lot belonging to Wagner Piano. The cross-claim can thus be construed as genuine and based on substantial grounds.

[50] It has not escaped my attention that there are two fundamental points which distinguish the instant case from *Dataran Rentas* and *Hasjuara*. In *Dataran Rentas* and *Hasjuara*, the dispute was between the employer and the main contractor. Thus unlike in the instant case, those suits were between contracting parties. There was no question on the pivotal issue of the absence of a contractual nexus. As I mentioned earlier, this issue alone justified the granting of the injunction against the defendant in the instant case.

[51] The second point of distinction is that both *Dataran Rentas* and *Hasjuara* involved the stage of the hearing of a winding up petition itself. Although the formulation of the critical question of whether a debt claimed under the winding up notice is *bona fide* disputed on substantial grounds is in essence the same in a *Fortuna* injunction application (to decide whether to

grant an injunction to stop the petition) or as in hearing the petition proper (to decide whether to grant the winding up order), the decisions in these two cases therefore did not strictly consider the situation in the context of a step earlier in time, namely an application for a *Fortuna* injunction to prevent the petition from being presented. Indeed there are authorities which held that matters such as cross-claims should rightfully only be considered during the hearing of the petition itself, and not appropriate to be relied on as a basis to stall the presentation of the petition by way of a *Fortuna* injunction (see the Court of Appeal decision in *Zalam Corporation Sdn Bhd v. Dolomite Readymixed Concrete Sdn Bhd* [2011] 9 CLJ 705).

[52] The assertion of the existence of cross-claims was not accepted in *Zalam Corporation*, but importantly, in that case, the defendant already had secured a judgment debt, which formed the basis of its winding up notice. In the instant case, like in *Hasjuara*, there is no judgment debt. It is also worthy of mention that in *Josu Engineering*, the cross-claim even defeated the statutory right of a judgment creditor to present a petition, *albeit* the cross-claim itself was in the nature of an interlocutory judgment.

[53] It was further held by the High Court in *Josu Engineering* that the injunction was also allowed to prevent irreparable damage to the plaintiff in that case. However, as referred to earlier in this judgment, in *Pacific & Orient Insurance*, the Court of Appeal was clear in stating that the question of whether there was irreparable damage was wholly irrelevant when there is a judgment debt, as a petition would thus be bound to fail. In any event, again, in the instant case, there is no judgment debt. As such, there is stronger basis to consider the cross-claim at this stage.

[54] In any event, I am satisfied that the plaintiff in the instant case has shown that it and the project will suffer irreparable harm if the injunction is not granted, especially considering the implications of a winding up petition on the ongoing Residensi Tribeca Project, including in respect of any such petition constituting an event of default under the relevant financing arrangements binding the plaintiff in the facilities agreement with HSBC Bank Malaysia Berhad dated 10 December 2014, more so since it was averred on behalf of the plaintiff that there were already 164 confirmed end-purchasers in respect of whom 73 purchasers had obtained end financing for the acquisition of the units.

[55] Furthermore, it is also observed that the financial solvency of the plaintiff is not challenged by the defendant. Its financial statements for the year ended 31 December 2014, as exhibited to the affidavit in support, disclosed cash and cash equivalent balances in the amount of RM23,807,634. It would be relevant that the insolvency of the plaintiff be shown in a *Fortuna* injunction application (see the Court of Appeal decisions in *Tan Kok Tong* and *Westform Far East Sdn Bhd v. Connaught Heights Sdn Bhd* [2010] 2 CLJ 541; [2010] 3 MLJ 459).

[56] In my view, considering the nature and context of the claims between the parties in the instant case, there is nothing preventing the defendant from pursuing what is probably a more efficient dispute resolution mechanism, by making an adjudication claim pursuant to the Construction Industry Payment and Adjudication Act 2012 ("CIPAA"). This could be the more suitable alternative procedure for the defendant to assert its claim, instead of inflicting upon the plaintiff undue pressure *via* a winding up notice through the medium of the winding up court that could occasion irreparable damage to by any account an otherwise commercially solvent company, and when there is no judgment debt.

[57] I do not agree that the plaintiff's claim is an afterthought intended to stifle a genuine statutory right. In the first place, the absence of a contractual relationship means the defendant's claim of debt owing to it from the plaintiff must necessarily fail. If that is not sufficient, it is clear that the said debt is *bona fide* disputed on substantial grounds, considering there is no judgment debt and taking into account the assertions of right of set-off and the existence of cross-claims. A petition, if one be presented on the strength of the s. 218 notice in the instant case, is thus bound to fail. This is the classic formulation of the first principle or ground entitling the grant of *Fortuna* injunction, as made clear by cases such as *Pacific & Orient Insurance*.

[58] Further, the defendant's pursuit of the s. 218 notice may also be construed as falling within the second principle of *Fortuna* injunction given the defendant's choice of instituting the winding up process as it has, and in the process risking irreparable damage to the otherwise solvent plaintiff, instead of invoking the more suitably structured resolution mechanism under CIPAA. In short, in all situations, in the instant case, allowing the s. 218 notice to stand and a winding up petition be presented would be an abuse of process that the court will not countenance.

New Development

[59] During the course of these proceedings, parties attempted to reach a settlement of the dispute, and the plaintiff had made a payment for the sum of RM1,258,911.34 to the defendant. The letter enclosing the payment was marked "without prejudice". As negotiations failed, the plaintiff at the hearing of encl. 1 sought for the return of the said sum to the plaintiff. The plaintiff contended that if the s. 218 notice is found to be an abuse of process, the payment received by the defendant "from the said abuse of process" must be restored to the plaintiff. The plaintiff further asserted that the issue on "without prejudice" is irrelevant because, relying on the English case of *Rush & Tompkins Ltd v. Greater London Council* [1989] AC 1280, the plaintiff is not using the letter to establish any admission from the defendant. The letter ought to be admitted to show the sum was in fact paid to the defendant.

[60] I note from the affidavits for the plaintiff that the payment was made after the plaintiff filed encl. 1 but before I allowed encl. 7 for the *Fortuna* injunction for the plaintiff on 8 April 2016. This information was understandably not disclosed to me before I delivered my decision on encl. 7. This must also have been because the payment was made on a without prejudice basis. Following my decision, the plaintiff has now chosen to waive its right to privilege by disclosing the same, and seek recovery of the said sum.

[61] I am however not persuaded that this is a matter that I should determine for two principal reasons. First, the payment was made after the commencement of proceedings initiated by the plaintiff, and secondly, the request is neither specified in nor falling within the scope of encl. 1. As such, I make no order on the request for the return of the said sum from the defendant to the plaintiff.

Conclusion

[62] On the basis of the foregoing analysis and reasons, it is my judgment that the plaintiff has successfully established its case for the grant of a *Fortuna* injunction to restrain the presentation of a winding up petition by the defendant against the plaintiff. If permitted to subsist, the s. 218 notice too would constitute an abuse of process. It therefore, must be held to be void. I accordingly allow encl. 1 with costs.